Since analysis is invited we look more closely at the terms proposed.

A Richfield employee having been employed for more than one year and being between the ages of 30 and 65, may at stated dates contribute through regular payroll deductions up to 5 per cent of his normal wage, but not less than $5 per month. Richfield then promises to contribute regularly an amount equal to one-half of the employee's monthly contribution. "The Company will make an annual contribution of a sum based upon the ratio of its profits to invested capital which will adjust the total monthly contributions made by the Company to the following schedule." Then, having specified that "profits" shall mean the Company's net income after taxes for the preceding calendar year, Richfield in its schedule shows that its annual contribution will run from 50 per cent to 75 per cent. No cash or stock is to be distributed to anyone while a member of the Plan, but at or after age 55 a man may receive all cash and stock credited to his own member account, representing his contributions, and to a "trusteed" account, representing the Company contributions. If upon *termination of service* of less than 10 years, a man withdraws before age 55 except because of death or defined disability, he may receive all cash and stock credited to his "member" account, but only a reduced percentage of the same credited to his trusteed account, prorated according to a schedule of service. It he withdraws from the Plan *while remaining an employee,* an employee may receive only the cash and stock credited to his own member account, and, irrespective of age, or years of membership in the Plan, he will not be entiled to any part of the cash or stock in his trusteed account. There are other details which we need not now mention except that the Plan defines "service." That term shall mean the continuous period of time he is an employee of the Company "in accordance with its established policy." The Plan says: "Its continuity shall not be deemed broken during any period of authorized leave of

absence or during any layoff period not exceeding the consecutive days prescribed by the Company's policy when the layoff occurs. Its continuity shall be immediately broken by discharge, resignation or layoff exceeding the prescribed period."

Enough has been said on this point to demonstrate that the Plan is something "more than that" argued to us. Certainly "continuity" of uninterrupted service means that each participating employee will receive from the Company an emolument equal to at least 50 per cent of his own contributions if the Company's net earnings reach only 11 per cent per annum, while his emolument for each additional per cent of net profits increases 5 per cent up to a maximum of 75 per cent of the employee's contributions. If that is not tantamount to a wage incentive program for uninterrupted service, it should at a minimum, cause any employee, all eligible participating employees, substantial concern as to what happens should there be a strike. The Plan is silent on the point. If 68 per cent of the Company's eligible employees are participating in the Plan, and they are, they might readily consider themselves ill-advised to take any steps which would disentitle them to receive Company contributions reaching to a possible 75 per cent of their own contributions over the period of participating years.

Perhaps on the foregoing account, the Union sought an agreement that the Plan was not to be impaired or abrogated "as a result of, or solely by reason of, any strike or lockout." In that context the Union proposed a definite understanding that "the effect of any stirke or lockout shall be limited to the effect of suspension of contributions by both Company and participants during the periods of strikes or lockouts." The Union, too, asked firm agreement that "Participation by an employee who is granted a Union leave of absence shall not be terminated during such leave but allotments shall be suspended in accordance with the suspension provisions of the 'Stock Purchase Plan.'" The Union sug-

gested further that the Plan run concurrently with its collective bargaining contract, the provisions of the Plan accordingly not be "subject to change as to Employees or Participants represented by the Union," and otherwise as proposed. Apart from clarification of the status of its members in such particulars, it is possible the Union also had in mind the impairment of its status in the eyes of its members as well as other Company employees when, despite its having been chosen as the bargaining representative of its unit with a valid contract in full force and effect, Richfield nonetheless unilaterally and without notice to the Union, announced the Plan. The bland assertion that Richfield contemplated merely an opportunity for employees to invest in the Company's stock would seem to fall short of its conclusion that "The Plan is nothing more than that." (*supra.*)

Richfield argues that bargaining as ordered by the Board "interferes with its legitimate rights under the law, and its exclusive right to control of management." Counsel argues that "There are certain matters concerning which the law does not permit, much less compel, collective bargaining, even when such matters are terms or conditions of employment." There is no provision of the Act which precludes collective bargaining on a deferred payment stock purchase plan such as we have before us. It is difficult to understand that a voluntary agreement to bargain on such a subject can be said to be a matter "which the law does not permit." The parties expressly stipulated before the Board:

> "Certain corporations in the oil industry have in the past several years bargained with unions representing their employees with regard to plans under which the employees may engage in stock purchase programs whereby they acquire stock in their corporate employer at terms more favorable than those available to the public generally because of employer contributions proportionate to the employees' contributions to such stock purchase program. Neither Counsel for the General Counsel nor the Charging Party will offer

or rely upon the foregoing fact as showing a practice, either in industry generally or in the oil industry of bargaining with respect to such plans; General Counsel and the Charging Party will offer the said fact and rely thereon, for the sole purpose of showing that there is precedent for such bargaining." (J.A. 14-15)

Richfield does not limit its argument to what the law will "permit," to be sure. As to what the law will "compel" and to illustrate its point concerning non-bargainable proposals, Richfield cites situations involving closed shop provisions not in conformity with requirements of the Act, welfare and retirement fund proposals which unlawfully discriminate, demands for excessive union membership fees and certain featherbedding provisions. The quick answer is that what the Union sought to discuss was none of these things, and nothing like any of them. Of course employers will be protected in their legitimate rights, indeed the Board makes clear that the statutory representative cannot act, and the employer need not bargain with it, except as the representative of the employees as such. Moreover, if the Board should enter and thereafter seek enforcement of an improvident order, except as to a permitted bargainable issue, the courts are still here.[5]

There is involved no threat to Richfield's "maintaining the integrity of its own business ownership, the control of its own management and its own representatives free from union interference." Nor is there substance to the claim that the situation "necessarily and inevitably involves bargaining about the conditions and prerogatives of ownership." Richfield in support of such contentions tells us, and cites cases[6] to prove its point, that when

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[5]Compare Labor Board v. Express Pub. Co., 312 U.S. 426, 437 (1941); May Stores Co. v. Labor Board, 326 U.S. 376, 388, 389 n. 10 (1945); Labor Board v. Warren Company, 350 U.S. 107, 112 (1955).

[6]Packard Co. v. Labor Board, 330 U.S. 485 (1947); Texas Co. v. National Labor Relations Board, 198 F.2d 540, 542 (9th Cir. 1952); National Labor Relations Board v. Retail Clerks Inter. Ass'n, 211 F.2d 759 (9th Cir. 1954), *cert. denied*, 348 U.S. 839 (1954).

Congress classified supervisors as a part of management, management itself and all management representatives were already beyond a bargaining duty imposed by the Act. On that premise the Board is assailed for its failure to assure management immunity from union interference. Somehow, the claim falls as short of reality as the cases cited fail to deal with the issue here.

Richfield says the the Board's order will result in violation of the fundamental requirements of the Act and its basic policy by dividing the loyalty of the union between the duty to ownership on the one hand and to employees on the other. Richfield sees conflicting representations between ownership and employee interests, between stockholder employees and non-stockholder employees, and between those employees who aspire to be investors and shareholders and those who do not. It is to be doubted that there are such basic conflicts as Richfield envisions, but if there are, what are we to say in the light of its claim that its own, indeed its whole, purpose in offering the plan is to provide "an opportunity for employees to invest in the Company's stock"? Richfield here relies upon the *Bausch & Lomb Optical Co.* case, 108 N.L.R.B. 213. A mere reading of the case will disclose that it is totally inapposite to our problem. There, the union had set up a competing business with that of the company for whose employees it proposed to speak. It can scarcely be said that employees as stockholders are analogous to employees as competitors from a bargaining point of view. Where only stockholders are to have the right to be heard, the Union shall have no voice whatever as a statutory representative, the Board emphasized.

In any event, the Union has asked nothing concerning managerial functions. The Plan is limited to open market share purchase. The maximum rate of employee contributions is 5 per cent of salary, yet there are some 4,000,000 shares outstanding, we are told. The bargaining the Union sought involves, not control of the Company, but the status of the offer and of the employees who

rely upon it. Richfield invites its employees to become stockholders whether they belong to this Union or not, and seeks to keep them as stockholders by withholding their deferred benefit of Company contributions until as to each employee, all conditions of the Plan shall have been met. To the extent that the Board may rely upon such provisions as stating a "condition of employment" and hence may establish one of the bases upon which its order rests, we think it is correct. Equally Richfield's fears are ill-founded, we suggest, if the Company is correct in its representations to us that "Richfield may terminate the entire plan at will." Section X, if it be controlling, and on this point we do not rule, in part expressly provides: "The Board of Directors of the Company reserves the right to amend or terminate this PLAN at any time."

Richfield seeks to pitch its argument on yet additional grounds which may be briefly noted. We are told that the duty to bargain collectively could not have been intended by Congress to cover a "field as significant as that of stock acquisition and ownership." Aside from the fact that Congress never forbade such bargaining, the Company's point is not of the essence of the issue before us. Our question is far more narrowly limited since Congress expressly *has* provided for collective bargaining with respect to wages and conditions of employment. To the Board has been left the determination as to what facts and circumstances spell out "wages" or what situations involve other "conditions of employment." We will presently reach consideration of the case in those very terms.

Meanwhile we note the Company's further claim that the Board's order violates constitutional rights:

> (1) by "depriving the employer of freedom and liberty to contract concerning the disposition of its property" in contravention of the Fifth Amendement[7];

[7]But the stock is to be bought in the open market, hence from individual willing sellers, and otherwise the terms of the offer have been fixed by the Company itself.

(2) by superseding the individual employee's freedom of contract by binding employees to purchase stock with funds already earned and owned by them[8]; and

(3) by transcending the authority delegated to the Board because as so exercised, the Board's power may be "so broad as to include the ownership of corporate employers," all without "understandable limitations on its scope"; and besides, the Act as so interpreted, may "invade the field of legislation reserved to the States."[9]

It requires no citation of authority to support the obvious, that in designating a bargaining representative, employees make their choice "for the purpose of negotiating the terms and conditions of their employment."[10] The Union here sought to speak only for its

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[8]But participation in the Plan is entirely voluntary and optional with the employee, just as is participation in the Retirement Annuity Plan, long since established by the Company.

[9]But neither the Union's proposed "Memorandum of Understanding" nor its proposed modifications in the Plan looked to "ownership" of Richfield. The Board's order went no farther than that Richfield "Cease and desist from refusing to bargain collectively with Oil Workers International Union, CIO, as the exclusive bargaining representative of its employees in the appropriate unit with respect to its 'Stock Purchase Plan.'" Moreover, in its opinion the Board said:

> "At the bargaining table, therefore, the statutory representative cannot act, and the employer need not bargain with it, except as the representative of employees as such, and only with respect to 'rates of pay, wages, hours of employment, or other conditions of employment.' And, even in these areas, it may be appropriate to point out to those who are inclined to equate an employer's obligation to bargain with a complete and abject submission to every union proposal, the Act, in the words of the Supreme Court, 'does not compel any agreement whatsoever between employees and employers.' [Citing N.L.R.B. v. American Nat. Ins. Co., 343 U.S. 395] On the occasion of stockholder meetings, corporate elections, or any other matter in which only stockholders have the right to be heard, the union has no voice whatever as a statutory representative." 110 N.L.R.B. at 363.

And see § 8(d): ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1952).

[10]§ 101, 61 STAT. 136 (1947), 29 U.S.C. § 151 (1952).

own bargaining unit, as the Act authorizes with respect to "rates of pay, wages, hours of employment, or other conditions of employment." Under the Plan, only a limited, defined class of employees will be eligible to participate, but they must be employees. Their chance to receive from their employment an emolument to be contributed by the Company depends, not only upon their continued service in an employee status over a prescribed number of years, but upon their own contributions up to 5 per cent of their wages or salary. So what is "service" within the meaning of the Plan, or how "wages" shall be determined upon which to base the percentage of possible contributions, or how continuity of status is to be ascertained and preserved, or what effect there may be upon the employees' rights to participate in future benefits in the event of strikes or lockouts, or whether a Union man on Union business may be on leave of absence, or whether "Company policy," undefined, shall solely govern the effect of lay-offs upon the employees' right to future benefits, or what relationship the "Company policy" in such matters shall bear to similar bargainable issues previously resolved in the outstanding collective bargaining agreement with the Union, and comparable problems, may become of great importance in cementing harmonious industrial relations between the Company and its employees. To achieve the purposes of the Act, resolution of issues on any such subject may well further the objectives Congress sought, although we do not decide, in the absence of a record on a particular point, that any special problem inevitably gives rise to a necessity for bargaining. The result in any such situation will depend upon the outcome of bargaining with reference to it, and complete agreement may follow negotiations.

The very fact that Congress has not defined "wages" or "terms" or "other conditions of employment" makes it clear that the Board is to deal within its own competence and expertise with the multiple variance of differing aspects of the problems arising in these fields. Then the courts will review and determine ultimately

whether or not the Board has acted permissibly and correctly. Thus, we have no difficulty in appreciating the observations of Circuit Judge Woodbury:

> "At least, without attempting to mark the outer boundaries of the meaning of the word 'wages' as used in the Act, or attempting to enunciate a generalizing principle for the decision of future cases, (generalization must await the accumulation of a body of decided cases pricking out the line between subject matters within the Act and subject matters outside its scope) we think it can safely be said that the word 'wages' in § 9(a) of the Act embraces within its meaning direct and immediate economic benefits flowing from the employment relationship. And this is as far as we need to go, for so construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually."[11]

So, too, we can here see that the deferred distribution program as outlined in the Plan offers emoluments of value comprehended within the term "wages," and accrued from the employment relationship.[12]

Likewise, we agree with the Board opinion that the Plan comes within the "conditions of employment" category. It would add nothing to go beyond the views expressed by the Seventh Circuit:

> "Suppose that a person seeking employment was offered a job by each of two companies equal in all respects except that one had a retirement and pension plan and that the other

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[11]W. W. Cross & Co. v. National Labor Relations Board, 174 F.2d 875, 878 (1st Cir. 1949).

[12]See COLLECTIVE BARGAINING ON STOCK PURCHASE PLANS, Sobernheim and Brown, 55 COLUM. L. REV. 1000 (1955); Comments, 43 GEO. L.J. 309 (1955); 23 GEO. WASH. L. REV. 609 (1955); COMPENSATING THE CORPORATE EXECUTIVE, Washington and Rothschild, Ch. 6 and 7 (Rev. Ed. 1951).

did not. We think it reasonable to assume an acceptance of the job with the company which had such plan. Of course, that might be described merely as the inducement which caused the job to be accepted, but on acceptance it would become, so we think, one of the 'conditions of employment.' Every day that such an employee worked his financial status would be enhanced to the extent that his pension benefits increased, and his labor would be performed under a pledge from the company that certain specified monetary benefits would be his upon reaching the designated age. It surely cannot be seriously disputed but that such a pledge on the part of the company forms a part of the consideration for work performed, and we see no reason why an employee entitled to the benefit of the plan could not upon the refusal of the company to pay, sue and recover such benefits. In this view, the pension thus promised would appear to be as much a part of his 'wages' as the money paid him at the time of the rendition of his services. But again we say that in any event such a plan is one of the 'conditions of employment.' "[18]

Richfield's petition for review will be denied and the Board's order for enforcement will be granted as prayed for in its answer to the petition.

Let an order enter accordingly.

WILBUR K. MILLER, Circuit Judge, *dissenting*: I dissent because, in my opinion, the stock purchase plan is not a subject concerning which the Act requires collective bargaining. Cf. Board Member Beeson's dissenting opinion in this case, 110 N.L.R.B. at 366 (1954).

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[18]Inland Steel Co. v. National Labor Relations Board, 170 F.2d 247, 253 (7th Cir. 1943), *cert. denied* on this issue, 336 U.S. 960 (1949); and see National Labor Relations Board v. J. H. Allison Co., 165 F.2d 766 (6th Cir. 1948), *cert. denied*, 335 U.S. 814 (1948); cf. National Labor Relations Board v. Black-Clawson Co., 210 F.2d 523 (6th Cir. 1954).

APPENDIX C

United States Court of Appeals
For the District of Columbia Circuit
January Term, 1956.

No. 12,483

Richfield Oil Corporation, Petitioner,

v.

National Labor Relations Board, Respondent.

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Wilbur K. Miller, Bazelon and Danaher, Circuit Judges.

ORDER

This case came on to be heard on the record from the National Labor Relations Board and on a petition for review and a cross-petition for enforcement of the order of the National Labor Relations Board herein, and was argued by counsel.

On consideration whereof, it is ORDERED by this Court that the petition of Richfield Oil Corporation for review of the order of the said National Labor Relations Board in this case be, and the same is hereby, denied.

It is FURTHER ORDERED by the Court that respondent's cross-petition for enforcement of the order of the National Labor Relations Board in this case be, and the same is hereby, granted, and that said order be enforced. Pursuant to Rule 38(1) of this Court, the respondent shall within 10 days hereof serve and file a proposed enforcement decree.

Dated: January 16, 1956.

Per Circuit Judge Danaher.

Dissenting opinion by Circuit Judge Wilbur K. Miller.

[Endorsed]: United States Court of Appeals for the District of Columbia Circuit Filed Jan 16 1956 Joseph W. Stewart, Clerk

APPENDIX D

In the United States Court of Appeals
for the District of Columbia Circuit

No. 12483

Richfield Oil Corporation, a Corporation, Petitioner,

v.

National Labor Relations Board, Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Wilbur K. Miller, Bazelon and Danaher, Circuit Judges.

This cause came on to be heard upon the petition of Richfield Oil Corporation to review an order of the National Labor Relations Board issued against petitioner on October 18, 1954, and upon the cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 5, 1955, and has considered the briefs and transcript of record filed in this cause. On January 16, 1956, the Court, being fully advised in the premises, handed down its decision denying the petition to review and enforcing the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Petitioner, Richfield Oil Corporation, Los Angeles, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from refusing to bargain collectively with Oil Workers International Union, CIO, as the exclusive bargaining representative of its employees in the appropriate unit with respect to its "Stock Purchase Plan."

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the National Labor Relations Act, as amended:

(a) Upon request, bargain collectively with Oil Workers International Union, CIO, as the exclusive representative of all its employees in the aforesaid appropriate unit with respect to its "Stock Purchase Plan."

(b) Post at all its operations where employees in the appropriate unit are employed copies of the notice attached hereto, marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-First Region of the National Labor Relations Board, Los Angeles, California, shall, after being signed by Petitioner's representative, be posted for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Petitioner to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree, what steps Petitioner has taken to comply herewith.

February 8, 1956.

Judge, United States Court of Appeals
for the District of Columbia Circuit

DAVID L. BAZELON
Judge, United States Court of Appeals
for the District of Columbia Circuit

DANAHER
Judge, United States Court of Appeals
for the District of Columbia Circuit

Circuit Judge Wilbur K. Miller dissents from the foregoing decree.

[Endorsed]: United States Court of Appeals for the District of Columbia Circuit Filed Feb 8 1956 Joseph W. Stewart, Clerk

Appendix A

Notice to all Employees

Pursuant to

A Decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will bargain collectively upon request, with OIL WORKERS INTERNATIONAL UNION, CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to our "Stock Purchase Plan," and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is: All production, construction, and maintenance employees employed by the employer in the Producing, Refining, Natural Gasoline, Pipe Line, and Long Beach Harbor Terminals Divisions in the State of California, including working foremen and pipe line gaugers, but excluding all clerical, administrative, professional, technical, casual, temporary, Marine Department, and electrical employees, guards, gatemen, watchmen, and all supervisors as defined in the Act.

RICHFIELD OIL CORPORATION
(Employer)

By _____
(Representative) (Title)

Dated February 8, 1956.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 719

RICHFIELD OIL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 6–19) is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 118–144)[1] are reported at 110 NLRB 356.

JURISDICTION

The order of the court below (Pet. App. 20) denying Richfield's petition for review and grant-

[1] References designated "R." are to the Joint Appendix to the briefs in the court below.

13). Petitioner subsequently confirmed in writing its position that the stock purchase plan was not a proper subject of collective bargaining (R. 121; 13, 114).

The plan was put into effect on July 1, 1953 (R. 12, 92). At this time petitioner sent each employee a booklet which contained the provisions of the plan and included the declaration of the trust under which the funds were to be held and the plan administered (R. 12, 83–101).

As stated in the booklet, the Company's purpose in establishing a stock purchase plan was "to foster a closer and continuing association" between petitioner and its employees (R. 121; 83). Under its provisions, employees are afforded an opportunity to invest a portion of their regular pay, to be matched in specified proportions by contributions from petitioner, in the purchase of petitioner's common stock (R. 83–101). Employee investments may range, at their option, from $5.00 a month to 5 percent of their monthly salary; petitioner's contributions in turn range from 50 percent to 75 percent of the sum invested by the employee, the exact amount to be adjusted annually in accordance with a scale based on petitioner's profits for the year (R. 122; 85–86). The contribution of each is turned over at regular intervals to a trustee, and credited to separate accounts, both of which are maintained under the participating employee's name (R. 122; 87). The sums thus held by the trustee are

used by him for the purchase of company stock which is regularly allocated to the employees' accounts (R. 122; 87–88). Dividends distributable to the employee-shareholders under the plan are likewise received by the trustee and made available for the purchase of additional stock in the same manner as employee and employer contributions (R. 122; 88).

Participation in the plan is voluntary, and is restricted to employees who have had one or more years of service with petitioner and who are between 30 and 65 (60 if a woman) years of age (R. 121–122; 85). Service with petitioner is not "broken during any period of authorized leave of absence or during any layoff period * * *" (R. 84–85). During the entire period that an employee is a participating member of the plan his accumulated shares of stock and cash credits are maintained for him by the trustee and cannot be distributed to him or alienated by him (R. 122–123; 90). Upon an employee's termination of service with petitioner, if he has reached age 55 (50 if a woman) or has had 10 or more years service with petitioner, he receives all shares and uninvested cash held by the trustee in his accounts; similarly, in the event of death or total and permanent disability, either the employee or his beneficiary receives full benefits (R. 122–123; 88–89). A participating employee under the stated age who leaves his employment after service of between 5 and 10

years receives shares and uninvested cash attributable to his own contributions but only part of the shares and uninvested cash (50 percent to 100 percent, depending on amount of service) attributable to petitioner's contributions. An employee who leaves with less than 5 years of service receives only the shares purchased with his own contributions together with uninvested cash contributed by him (R. 123; 89). An employee who withdraws from the plan while retaining employment with petitioner receives no shares or cash contributed from company funds, regardless of his age, and is ineligible to participate in the plan for 2 years (*ibid.*).

Participating employees are authorized to instruct the trustee in the voting of all shares held in their accounts (R. 123; 90, 98). Expenses incurred in the administration of the plan are borne by petitioner, which reserves the right to amend or terminate the plan at any time (R. 123; 91–92). However, funds and shares held by the trustee cannot be used for any purpose other than the benefit of the participating employees (R. 123; 92). At the time of the hearing before the trial examiner, approximately 2,500 of the 3,300 employees eligible under the plan had become participating members (R. 13).

Upon the foregoing facts the Board (Member Beeson dissenting) concluded that petitioner had violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union respecting

the stock purchase plan. Petitioner's contributions under the plan and the benefits which inure to the employees thereunder were determined by the Board to be "an emolument of value" to employees which "flowed from the employment relationship" and therefore constituted "wages" within the meaning of Sections 9 (a) and 8 (d) of the Act, subject to the bargaining requirement of Section 8 (a) (5) (R. 124–125). The Board further held that since the plan creates terms and conditions under which employment status is afforded, it was "also encompassed by the term 'other conditions of employment,'" and for that additional reason was a proper subject of collective bargaining under Sections 8 (a) (5), 9 (a), and 8 (d) of the Act (R. 126–127).

B. The decision of the court below

The court below, Judge Miller dissenting, agreed with the Board that the stock purchase plan is covered by the statutory terms "wages" and "conditions of employment," with respect to which bargaining is required, and enforced the Board's order against petitioner. In reaching its conclusion the court rejected, as falling "short of reality," petitioner's contention that the stock purchase plan involved control of business ownership and management which under the Act are free from the requirements of collective bargaining (Pet. App. 14). Judge Danaher's opinion

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observes that the Union did not seek to discuss any such "legitimate rights" of employers, but rather sought negotiations as to aspects of the plan which were of "substantial concern" to the employees as such (Pet. App. 11, 13). The court below similarly found without merit petitioner's argument that bargaining with respect to stock ownership would result in dividing the loyalty of the Union between the interests of employees and those of shareholders. Thus, the court noted that any such conflicts which may arise are attributable to the fact that petitioner's plan provides "an opportunity for employees to invest in the Company's stock," and are not the result of subjecting the provisions of the plan to bargaining (Pet. App. 14). Summarizing the considerations which show that petitioner's plan falls within the area prescribed by the Act for collective bargaining, the court stated (Pet. App. 17):

> * * * what is "service" within the meaning of the Plan, or how "wages" shall be determined upon which to base the percentage of possible contributions, or how continuity of status is to be ascertained and preserved, or what effect there may be upon the employees' rights to participate in future benefits in the event of strikes or lockouts, or whether a Union man on Union business may be on leave of absence, or whether "Company policy," undefined, shall solely govern the effect of lay-offs upon the employees' right to future benefits, or what

> relationship the "Company policy" in such matters shall bear to similar bargainable issues previously resolved in the outstanding collective bargaining agreement with the Union, and comparable problems, may become of great importance in cementing harmonious industrial relations between the Company and its employees * * *. The result in any such situation will depend upon the outcome of bargaining with reference to it, and complete agreement may follow negotiations.

ARGUMENT

While we agree with petitioner that the rule enforced in this case by the Board and the court below is important in that it affects the increasing number of instances where employee stock purchase plans are being adopted, the result is in our view so clearly correct as to obviate any need for further review. Cf. *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247 (C. A. 7), certiorari denied, 336 U. S. 960. Far from depriving employers of "legitimate rights protected by the National Labor Relations Act" (Pet. 16), the requirement of collective bargaining concerning the obvious and direct economic benefits to employees, which constitute the whole significance of plans like petitioner's, follows plainly from the statutory command to bargain with respect to "wages" and "conditions of employment." And petitioner is mistaken in its claim (Pet. 6–11) that there are conflicting decisions in other circuits.

1. The decision below is a correct application of the principles evolved in the uniform holdings of the courts of appeals requiring collective bargaining under the Act with respect to similar employee benefit plans. Thus, profit sharing,[2] group health insurance,[3] and pension and retirement plans[4] have all been held subject to this bargaining requirement. Decisions in such cases have established that the statutory term "wages" comprehensively includes all "emoluments resulting from employment in addition to or supplementary to actual 'rates of pay'" (*W. W. Cross & Co.* v. *National Labor Relations Board, supra,* 174 F. 2d at 878), and that the term "conditions of employment" refers at the least "to the terms or conditions under which employment status is offered" (R. 126). The stock purchase plan in this case falls well within both definitions.

Petitioner's contribution of stock to the employee participants, the dividends earned thereon, and the "rights, options or warrants * * * to purchase Company stock" (R. 95) attributable thereto are all valuable benefits to which employees are entitled by virtue of their employment. No less

[2] *National Labor Relations Board* v. *Black-Clawson Co.*, 210 F. 2d 523, 524 (C. A. 6).

[3] *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221 (C. A. 2); *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875, 877–878 (C. A. 1).

[4] *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C. A. 7), certiorari denied, 336 U. S. 960; *National Labor Relations Board* v. *Jacobs Mfg. Co.*, 196 F. 2d 680, 682–683 (C. A. 2).

than the cash outlay to meet its regular payroll, these benefits, which petitioner offers in return for the permanent and efficient work force it hopes thereby to obtain, are an integral part of its total wage structure.

Similarly, like such matters as seniority, safety and sanitation facilities, and other settled "conditions of employment," the stock purchase plan is one of the conditions which prevail for persons in petitioner's employ. Because its provisions postpone receipt of employee contributions until termination of employment and contain length of service requirements, the plan directly affects employee retirement, which, as observed by the Seventh Circuit, has an obvious "effect upon the 'conditions' of the person's employment." *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247, 252, certiorari denied, 336 U. S. 960. Moreover, the aspects of the plan with respect to which the Union sought bargaining—its duration, its eligibility and length of service requirements, employee rights on withdrawal, and employee rights in strike situations—all relate to the kind of conditions of employment which the Act contemplates should, if possible, be resolved through collective bargaining.[8]

[8] Collective bargaining with respect to such aspects of employee stock purchase plans has frequently been practiced voluntarily. See Sobernheim and Brown, *Collective Bargaining on Stock Purchase Plans,* 55 Col. L. Rev. 1000, 1022.

The court below properly rejected the claim, repeated before this Court (Pet. 16–20), that the order in this case derogates from petitioner's exclusive rights of business ownership and management. As the court observed, "the Union has asked nothing concerning managerial functions" (Pet. App. 14). The plan itself involves only the redistribution of an insignificant percentage of outstanding shares, and calls neither for issuance of new shares or treasury shares; accordingly, as stated by the court below, to speak of interference with prerogatives of business control or ownership "falls as short of reality as the cases cited fail to deal with the issue here" (Pet. App. 14).

The effect which the plan has on management decisions in operating the business is not different from that which results from the wage structure of the business, or other factors which are established subjects of collective bargaining. As with wages, the opinion below makes clear, contrary to petitioner's assertion (Pet. 18–19), the employer's duty to bargain with respect to a stock purchase plan relates only to the legitimate interests of the employees therein, and not to matters within the exclusive province of management (Pet. App. 13). Petitioner's further assertion, that "the decision places no limit upon the scope of the proposals which the union may now or in the future make respecting stock acquisition by employees, or concerning the extent and character of the stock purchase demands upon which the company must

bargain" (Pet. 18–19), cannot be squared with the court's restriction of its decision to matters involving the legitimate interests of the employees, and its express withholding of any ruling "in the absence of a record on a particular point, that any special problem inevitably gives rise to a necessity for bargaining" (Pet. App. 17).[6]

In short, what is involved here is not a threat to petitioner's right to control its business, but bargaining with respect to those aspects of a stock purchase plan which affect the interests of employees as such and fall within the statutory terms "wages" and "conditions of employment."

2. Contrary to petitioner's assertion (Pet. 6–11), the decision of the court below creates no conflict among the courts of appeals. The petition itself reveals that none of the cases relied on in this respect involves subject-matter related to an employee stock purchase plan. Moreover, petitioner has not even shown in the cases it cites any disagreement with the court below on the points as to which it claims a conflict of decisions. Thus, the petition errs in analogizing the Union's demand in *National Labor Relations Board* v. *Retail Clerks Int'l Association*,[7] for bargaining respecting supervisory employees with the Union's request in this case to bargain

[6] See also the Board's restriction on the scope of its decision (R. 129–131).

[7] 203 F. 2d 165, affirmed on rehearing, 211 F. 2d 759 (C. A. 9), certiorari denied, 348 U. S. 839.

on behalf of employees' interests in the stock purchase plan. The Ninth Circuit's holding in the *Retail Clerks* case—where, it should be noted, the court enforced the Board's own determination that the matters in question could not be insisted upon by the union as required subjects of collective bargaining—was not, as petitioners say (Pet. 6), that a union was precluded from bargaining for the employees' "right to become supervisors," but that the union in that case made "demands covering a great range of the supervisors' employment and working conditions" (211 F. 2d at 763) which were improper under the Act's provision (Section 2 (3), (11)) excluding supervisors from coverage. Ruling on that different situation, the Ninth Circuit merely made the same distinction as that observed by the Board and the court below in this case—that "the employer need only bargain with [the union] * * * as the representative of the employees as such" and not in some other capacity to which the obligation to bargain does not extend (Pet. App. 13, R. 130).

Equally unavailing is petitioner's attempt (Pet. 9) to show conflict by describing the plan in this case as dealing "solely with disposition of wages earned and payable," and analogizing it as such to the plan for deducting union dues from wages which the Fifth Circuit found "not * * * a matter for collective bargaining" in *Hughes Tool Co.* v. *National Labor Relations*

Board, 147 F. 2d 69, 74. The obvious and critical factor which distinguishes the plan in this case from a dues deduction arrangement is that here the employee participants receive valuable benefits as a result of employer contributions, a fact which plainly brings the plan within the statutory definition of "wages" and "conditions of employment." As the court below observed, the plan is for this reason substantially more than "merely an opportunity for employees to invest in the Company's stock" (Pet. App. 12).

Nor is there a conflict with *National Labor Relations Board* v. *Bemis Bros. Bag Co.,* 206 F. 2d 33 (C. A. 5). There, the court explicitly recognized that the matter of company housing would be bargainable under various circumstances, particularly if comparatively low rentals might in effect serve as "a partial compensation" to the employees (p. 37). Finding no such circumstances, and observing that "each case must be determined upon its particular facts" (p. 38), the court held that the matter of housing in the situation before it was not a required subject of bargaining. The result is consistent with this case where, as noted above, the element of compensation in petitioner's plan is clear beyond doubt.

Finally, petitioner mistakenly attempts to suggest a conflict on the asserted ground that the court below, unlike the courts in other cases, "leaves it to the Board * * * to define the bar-

gaining duty" rather than applying "the requirements of the law" itself (Pet. 9, 11). The court below has made explicit that it has followed in this case the traditional practice, required by the Act, of permitting the Board to make the initial decision, reserving to the court the duty to "review and determine ultimately whether or not the Board has acted permissibly and correctly" (Pet. App. 17–18).

CONCLUSION

The petition for a writ of certiorari should be denied.[*]

Respectfully submitted.

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MARCH 1956.

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[*] In a letter to the Solicitor General, dated March 27, 1956, the Secretary of Commerce states as follows:

> It is the view of the Department of Commerce that the question involved in this case is a matter of substantial import to business and industry, and one which may have serious implications for the long-range future of American business. The growth of employee stock purchase plans in recent years has been quite pronounced, and in more and more cases demands are being

made in collective bargaining negotiations for the adoption of such plans. It is felt by many in business circles that mandatory collective bargaining on such plans could result in a substantial impingement on the ownership principle and on management authority in general. An issue of such importance, in our opinion, warrants review by the Supreme Court. If the Court refuses review, the question may be left unresolved for an indefinite time in the future.

In view of the statutory responsibility of the Department of Commerce to promote and encourage trade and commerce, the Department has, we feel, a proper interest in respect to matters which may seriously affect business and industrial activity. In expressing our interest in this case it is not our intention to question the legal correctness of the decision of another agency of government. We feel, however, that the public interest would be best served if this important issue were finally resolved at the earliest possible time.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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HAROLD B. WILLEY

No. 719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

RICHFIELD OIL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF FOR AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF PETITION

Pursuant to written consent of the parties, which has been filed with the clerk of this Court pursuant to Rule 42(1), American Retail Federation respectfully submits this brief as *amicus curiae* in support of the petition for certiorari herein.

INTEREST OF AMICUS CURIAE

The American Retail Federation is an association consisting of twenty-nine national retail associations and thirty-six state wide retail groups, comprising a membership in excess of 700,000 retail stores and employing an estimated 7,500,000 persons. Many members of the American Retail Federation are engaged in businesses whose operations affect interstate commerce and are

therefore subject to the jurisdiction of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, U.S.C.A., Title 29 §§141 *et seq.*).

As shown by the Petition for Certiorari herein (p. 21, n. 12) several retailers already have stock purchase plans, and if the decision of the court below is sustained, undoubtedly many others will be confronted with union demands for the establishment of such plans and will be compelled to bargain thereon. Thus, the failure of the court below in the instant case to apply correctly the pertinent provisions of the Labor Management Relations Act, 1947, in accordance with the manifest intention of Congress, will affect adversely the thousands of retailers who are members of the American Retail Federation.

The facts in the case are fully set forth at pp. 3-5 of the petition for certiorari. The question is whether petitioner violated the National Labor Relations Act (Act of June 23, 1947, c. 120, Title I, 61 Stat. 136, U.S.C.A. Title 29, §§ 151 *et seq.*, as amended) by refusing to bargain with the representative of its employees (hereinafter called the union) with respect to a voluntary employee stock purchase plan. The National Labor Relations Board and the court below, one judge dissenting, answered this question in the affirmative. We submit that this holding was in error and that it contravened the basic policies of the Act.

The principal statutory provisions involved are set forth in the appendix to the petition for certiorari (Pet. App., pp. 1-5). Other relevant statutory provisions are set forth in appropriate places in the Argument below.

ARGUMENT

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decision in this case turns upon the proper construction of Section 8(d) of the National Labor Relations Act, which spells out the subjects concerning which collective bargaining is required. The construction of such section is of major importance in the administration of said Act, since the principal purpose and significance of the Act lies in its guaranty of the right of collective bargaining. This Court has not yet decided the question here involved.

We submit that Section 8(d) must be construed in accordance with the plain meaning of its language and also with the underlying Congressional intent. Moreover, as we shall show, it must be construed so as to avoid interference with the legitimate rights of either party. In other words, implicit in the requirement of Section 8(d) that an employer bargain over "wages, hours, and other terms and conditions of employment" is the qualification that there be no interference with the employer's legitimate rights. Unless the decision below is reversed, there will remain outstanding a construction of Section 8(d) that permits interference with the employer's legitimate rights, contrary to the plain language and intent of both the section and the Act as a whole.

A. The Holding of the Court Below, Requiring the Petitioner to Bargain With the Union Concerning Its Voluntary Stock Purchase Plan, Contravenes the Basic Policies of the National Labor Relations Act.

The original National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, U.S.C.A., Title 29, §§151 *et*

seq.) made no mention of rights of *employers,* but dealt only with rights of *employees.* It forbade an employer to interfere with the rights of his employees to organize into unions, including their right to bargain collectively. But twelve years' experience under that Act, as it was construed by the Board and the courts, demonstrated to the Congress the need also to protect the rights of employers. Accordingly, the Labor Management Relations Act, 1947, was enacted and Title I of the Act consisted of a complete rewriting of the National Labor Relations Act. The Declaration of Policy, contained in Section 1 of the Labor Management Relations Act, 1947, stated in relevant part:

> "(b) . . . It is the purpose and policy of this Act . . . *to prescribe the legitimate rights of both employees and employers* in their relations affecting commerce, to provide orderly and peaceful procedures for *preventing the interference by either with the legitimate rights of the other . . .*" [Emphasis Supplied].

Thus Congress showed its intent that the rights of each group—employers and employees—were to be equally protected from interference by the other.

1. *One of the fundamental policies of the Act*[1] *is to exclude employees and unions from interfering with management's prerogative to manage.*

Various sections of the Act affirm the employer's right to manage without interference from his employees or their union representative. Thus Sections 2(3), 2(11), and 14(a) completely exclude supervisors from the Act's coverage. As stated by the report of the Senate Committee on Labor and Public Welfare on the bill that became the Labor Management Relations Act, 1947—

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[1] All references to the Act hereafter in this brief refer to the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

> "A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." *S. Rep. 105*, p. 3, 80th Cong. 1st Sess.

And on the floor of the Senate, Senator Taft, the co-author of the bill, said with respect to the Committee report on supervisors:

> "The Committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States." 93 Cong. Rec. 3952.

The House of Representatives was equally alert to the dangers of permitting unions to invade the prerogative of management to manage. In dealing with the exclusion of supervisors, the report of its Committee on Education and Labor stated:

> "The evidence further shows that management must have in the plants agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers." *H. Rep. 245*, p. 8, 80th Cong. 1st Sess.

Another example of rights reserved exclusively to management appears in Section 8(b)(1)(B) of the Act, which forbids unions from restraining or coercing an employer

> "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

With reference to this matter, Senator Taft, speaking of the Senate Committee bill, stated

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employer's association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." 93 Cong. Rec. 3953-3954.

Section 8(d) of the Act also had the effect of affirming management's right to manage. It provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession". It is plain that management cannot manage if deprived of the right to say no to a union proposal.

2. *The requirement of bargaining with respect to "wages, hours, and other terms and conditions of employment", imposed by Section 8(d) of the Act, should not be construed so as to nullify the basic policies of the Act.*

The Board's decision, which was upheld by the court below, states that

> "Section 8(a)(5)[2] itself discloses a Congressional

[2] Section 8(a)(5) merely makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)". Section 9(a) states that a majority representative shall be the

> intent to require collective bargaining as to all matters embraced by the terms 'rates of pay, wages, hours of employment, or other conditions of employment', and *admits of no exceptions.*" 110 NLRB 356, 34 LRRM 1658, 1661. [Emphasis Supplied].

But clearly the Board does not mean what it says. There are all kinds of subjects which might be considered "conditions of employment" and yet have never been held by the Board or the courts to be proper collective bargaining subjects. The identity of the president or the chairman of the board of directors of the employing company may well determine the financial success of the business, whether wages can be increased, and whether profits shall be paid as dividends to stockholders or in the form of increased wages to employees. These matters all affect the employees' livelihood and hence in a broad sense are "conditions of employment". But certainly no one would seriously argue that the identity of the president or chairman of the board is in fact a proper subject for collective bargaining.

Again, the amount and character of an employer's contributions to charitable and educational causes may well

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exclusive representative of the employees for purposes of collective bargaining "in respect to rates of pay, wages, hours of employment, or other conditions of employment". It may well be doubted that these two sections, standing alone, do any more than require the employer to accord recognition to the representative designated by the employees and to accept in good faith the practices and procedures of collective bargaining. They would not seem to require the employer to bargain with the majority union about every subject embraced within the language of Section 9(a). See *Cox and Dunlop*, Regulation of Collective Bargaining, 63 Harv. L. Review 389, 394-401, where the authors show that not a word in the hearings, in the committee reports, or in the debates on the original National Labor Relations Act suggests that the Act requires bargaining upon any particular subject. However, when the Act was amended in 1947, Congress wrote in Section 8(d), which defines the term "to bargain collectively", and such definition includes the obligation to "confer in good faith with respect to wages, hours, and other terms and conditions of employment."

affect the amount available for wage increases. Also the advertising media he may use in attracting customers, the market to which he appeals for the sale of his products, and the character and identity of the products he makes may have a direct bearing upon his ability to pay increased wages. Still further, his price policies, his production processes, his methods of financing and distribution of his products, and the matter of location of his plant may also have a direct bearing upon wages and conditions of employment. But none of these matters has ever been held to be a proper subject for collective bargaining. Turning to an example which is even closer to the matter involved in this case, it is plain that an employer need not bargain over his dividend policy, and the Board admitted as much in its decision here. (110 NLRB 356, 34 LRRM 1658, 1662). The Board is obviously incorrect therefore in its assertion that the Act requires collective bargaining as to all matters embraced by the terms "rates of pay, wages, hours of employment, or other conditions of employment" and "admits of no exceptions".

The courts also have shown that there are indeed "exceptions" to the unqualified rule the Board lays down. They have held, for example, that the union is not entitled to make its own time studies at the employer's plant, despite the obvious connection between such studies and the employees' conditions of employment. *NLRB* v. *Otis Elevator Co.*, 208 F. (2d) 176 (C.C.A. 2). They have also held that the employer need not bargain as to the duties and selection of supervisors, notwithstanding that may have some effect upon the working conditions of the rank-and-file employees. *NLRB* v. *Retail Clerks' Union*, 211 F. (2d) 759, 762-763, 765 (C.C.A. 9), *cert. den.*, 348 U.S. 839.

The reason why none of the foregoing matters is considered a proper subject for collective bargaining is that

all of them fall within the realm of an employer's prerogatives, which it is the basic policy of the Act to keep unimpaired, just as it is similarly the basic policy of the Act to keep an employer from interfering with the internal affairs of unions. To hold that an employer must bargain on any of these subjects would be to nullify that basic policy of the Act. *Cf.* statement of court below that employers "will be protected in their legitimate rights" (Pet. App. p. 13).

This court has stated that the term "collective bargaining" as used in the Act

> "has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 346.

See also *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 408. Bargaining over a voluntary stock purchase plan is not part of the "philosophy of bargaining as worked out in the labor movement of the United States". There is nothing in the record in the instant litigation to show that there is any practice in industry generally or in the oil industry specifically of bargaining with respect to stock purchase plans. And, in fact, as recognized by the court below (Pet. App., pp. 12-13), the Board made no claim that there is any such practice. The assumption must be otherwise in order to comport with the Act's policy of permitting the employer to act without interference from his employees or their union representative in matters which are basically part of management's rights to manage. Nothing could be more basic to management's rights than the very ownership of the employing company, a matter which may well be seriously influenced by an employee stock purchase plan.

3. The requirement that the employer bargain with a union over a voluntary employee stock purchase plan puts the union on both sides of the table.

It is perfectly plain from the face of the statute that employers and unions are required to bargain with each other in *good faith.* See Section 8(d). There can, of course, be no good faith bargaining unless it is at arm's length. Obviously, it is not good faith bargaining for either side to invade the province of the other.

The Act clearly forbids the employer from going over to the union's side, by making it an unfair labor practice for him "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it". See Section 8(a)(2). In those circumstances, an employer would be bargaining with himself and hence the objective of the Act, stated in Section 7, to permit employees "to bargain collectively through representatives of their own choosing", would be frustrated.

By the same token, where an employer is required to bargain with a union over a voluntary stock purchase plan, the union is in effect bargaining for a seat on the other side of the bargaining table also, which is likewise contrary to the Act's basic policies. The Board itself has recognized that a union cannot serve in a dual capacity of competing employer and bargaining representative of the employees. In *Bausch and Lomb Optical Co.,* 108 NLRB No. 213, 34 LRRM 1222, the employer was excused from bargaining with a union because the union had itself set up a business in competition with the employer's. The Board said (34 LRRM at 1224)

> ". . . the Union has acquired a special interest which may well be at odds with what should be its sole concern—that of representing the interests of the Respondent's employees".

The Board recognized in the *Bausch and Lomb* case that under plain language of the Act, the union was the majority representative of the employees and was entitled to be so recognized for purposes of collective bargaining. Nevertheless, the Board said that it was not bound by the strict words of the Act, but, relying upon the Declaration of Policy in Section 1 of the Labor Management Relations Act, 1947 (quoted *supra*, p. 4), it held that the employer was excused from bargaining with the union for the reason above stated. The Board in fact devoted several pages of its decision to a discussion of many cases, where it has departed from the strict words of the statute in order to effectuate the policies of the Act. 34 LRRM at 1223-1224. In the face of such abundant authority, it would seem that the Board acted improperly in ignoring the policies of the Act in the instant case.

In the *Bausch and Lomb* case, the Board said (34 LRRM at 1224)

> "What is envisioned by the Act is that in attempting to make such an agreement the parties will approach the bargaining table for the purpose of representing their respective interests and having approximately equal economic power. The employer must be present to protect his business interests and the union must be there with the single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent, and there must be no ulterior purpose. As the Supreme Court has stated: 'The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents.' In the event an impasse in negotiations occurs, the union has among its economic weapons, its right to call a strike. The employer has among its economic weapons the right to continue the existing terms of employment and to replace economic strikers. These represent the basic ground rules from which good-faith bargaining stems. In our opinion,

> the Union's position at the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective bargaining process".

So here, where the union's interest on behalf of the employees as stockholders obviously differs from the union's interest on behalf of the employees as employees, the union occupies a dual role which makes bargaining with it over the stock purchase plan highly inappropriate. Representing the employees as stockholders, the union's interest is in dividends and capital gains; representing them as employees its interest is in increased wages. The two may well be inconsistent. And as pointed out in the dissenting opinion of Member Beeson of the National Labor Relations Board,[3] as a result of the union's dual position, an employer might be required to furnish confidential data relevant to a stock plan, which information the union has heretofore been held by the Board without right to demand (110 NLRB 356, 34 LRRM 1658, 1664).

Contrary to the position taken by the court below (Pet. App., p. 14), the situation here is *a fortiori* that in *Bausch & Lomb*. There the employees were not attempting to purchase the stock and obtain control of the employer but had organized a competitive business. The dual role that the union sought to occupy in that case (and which the Board rejected) was therefore one step farther removed than in the subject case, where the employees seek to purchase the stock of the very employer with whom their union is bargaining.

Nor is it any answer to the problem of the union's dual role to suggest, as the court below does (Pet. App., pp.

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[3] Board Member Murdock, although participating in the oral argument before the Board in the instant case, did not join in either the majority or dissenting opinions.

13 *et seq.*), that the employer has to bargain with the union only as a representative of the employees *in their capacity as employees* and not *in their capacity as stockholders.* If the employer is required to bargain over the stock purchase plan, the union has the right to go into every aspect of that plan, including matters pertaining to dividends and in fact the whole financial structure of the employer, and such bargaining is bound to affect the employees both as stockholders and employees. It will be observed that in this very case the union, in demanding bargaining rights with respect to the stock purchase plan, set forth a stock purchase proposal, which differed substantially from the company's offer and dealt with many phases of the plan, including matters pertaining to voting rights and the matter of when the employees would acquire vested rights in company-contributed shares of stock (Pet., p. 3).

4. *The instant case is but one of a series of recent Board and lower court decisions on the requirements of collective bargaining in defiance of the Act's basic policies.*

The Act simply requires collective bargaining with respect to "wages, hours, and other terms and conditions of employment". The quoted words must be given their ordinary and commonly accepted meaning. As the Supreme Court has stated

> ". . . when [Congress] has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense . . . [the words are] to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618.

The ordinary meaning of "wages, hours, and other terms and conditions of employment" clearly does not

embrace a voluntary stock purchase plan for employees such as that here involved.

And when the legislative history of the Act is examined, nothing is found to support the conclusion that such a plan was intended by Congress to be embraced by the quoted words. The legislative history is indeed to the contrary. Senator Walsh, Chairman of the Senate Labor Committee when the original Wagner Act was being considered, said on the Senate floor at that time:

> "The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. *The bill does not go beyond the office door.* It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary and with that sacredness and solemnity to a voluntary agreement with which both parties to an agreement should be enshrouded." [Emphasis Supplied]. 79 Cong. Rec. 7659-7660.

When the Taft-Hartley Act was being considered, Congress wrote into the Act Section 8(d), which contains a definition of "to bargain collectively" that requires the parties to bargain over "wages, hours, and other terms and conditions of employment". No attempt was made to define these words, nor is there anything in the Congressional debates to indicate that Congress intended to broaden the meaning of these words and give them any but their ordinary meaning.

Thus, to hold that a voluntary stock purchase plan for employees falls within "wages, hours, and other terms and conditions of employment" is to misconstrue both statutory language and intent.

Since passage of the Taft-Hartley Act in 1947, however, the Board, sometimes with court approval, has

greatly widened the area of collective bargaining, holding it to embrace subjects surely never intended by the Congress. Thus, in the *Inland Steel* case (170 F. (2d) 247 (C.C.A. 7), *cert. den.* 336 U.S. 960), the court upheld a Board decision that bargaining was required over a pension plan. More recently, in *Whitin Machine Works*, 108 NLRB No. 223, 34 LRRM 1251, decided June 28, 1954 and *enforced* 217 F. (2d) 593 (C.C.A. 4), *cert. den.*, 349 U.S. 905, the Board held that a certified union had the "right to request and to receive from the Employer the names of the employees in the appropriate unit together with their individual wage rates". The Board found that "it is sufficient that the information sought by the Union is related to the issues involved in collective bargaining, and that no specific need as to a particular issue must be shown". Thus the Board ordered this invasion of the privacy of the individual employees, even though no need for the information was shown. In *F. W. Woolworth Co.*, 109 NLRB No. 32, 34 LRRM 1319, decided July 20, 1954, the Board extended the doctrine of the *Whitin* case to require the employer to furnish such information after the bargaining agreement is executed as well as during contract negotiations.

In *Truitt Mfg. Co.*, 110 NLRB No. 143, 35 LRRM 1150, decided November 15, 1954, *enf. den.* 224 F. (2d) 869 (C.C.A. 4), *cert. granted*, 350 U.S. 922, the Board held that "when an employer seeks to justify the refusal of a wage increase *upon an economic basis*, as did the Respondent herein, good faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof". The employer had cited his competitive position in the industry and asserted that granting the union's demands would make it impossible for him to continue in business. The employer's refusal to comply with the union's request for "full and complete information with regards

to (employer's) financial standing and profits during the past few years" was found to be a violation of the Act.[4]

These cases are illustrative of a trend on the part of both the Board and the courts to misread Section 8(d). That section, as already noted, defines collective bargaining as the obligation to confer "with respect to wages, hours, and other terms and conditions of employment". Yet in each of these cases the Board [and in most instances the courts] read Section 8(d) as if it contained the words "with respect to *things affecting* wages, hours, and other terms and conditions of employment". While almost anything can *affect* wages, hours, or employment conditions, Section 8(d) makes bargaining subjects only of things that are themselves comprised within the terms "wages, hours, and other terms and conditions of employment". Thus, the amount of piece work rates to be paid employees obviously falls within the term "wages", while the employer's advertising program simply *affects* the amount of money available for "wages". Similarly, the amount of heat or light available in a work place is clearly a matter falling within the terms "conditions of employment", but the identity of the president of the company is at most a matter *affecting* conditions of employment. And so, too, a pension plan for employees would seem to fall within the term "wages" because it

[4] Noteworthy also is a 1954 decision of the United States Court of Appeals for the Seventh Circuit, *Allis-Chalmers Mfg. Co.* v. *NLRB*, 213 F. (2d) 374, 381. That case deals with the reverse situation of that presented in the cases discussed in the text, namely the extent of the union's duty to bargain collectively. It holds that an employer may insist upon contract clauses subjecting the contract to a secret ballot or written ratification by the employees and limiting the right to strike by requiring prior approval of the employees in a secret ballot election. The Court found that such proposals constituted "conditions of employment" and that the union in refusing to bargain concerning them had not bargained in good faith. The union had argued that such proposals constituted interference with its internal affairs.

is a form of deferred compensation for work previously performed. On the other hand, a voluntary stock purchase plan, such as that in the instant case, merely *affects* wages, since it represents only a form of investment for the employee which may or may not turn out to be profitable. See Pet., pp. 14-15.

If Section 8(d) is indeed to be read as requiring bargaining over all matters *affecting* wages, hours and other terms and conditions of employment, the logical result is that bargaining is required as to all matters affecting the business, including methods of distribution of a product, methods of advertising and methods of financing the business. This amounts to co-determination by the employer and the union of all matters relating to the employer's business. Surely, had Congress intended any such startling and revolutionary result as "co-determination", it would have expressly so provided in the Act.

We submit that this Court should call a halt to the trend of decisions above outlined, which must inevitably lead to the result of "co-determination", and give to the words "wages, hours, and other terms and conditions of employment" a meaning which will carry out the basic policies of the Act. In this connection it should be observed that this Court has not yet passed upon any of the matters involved in the foregoing trend of decisions.

CONCLUSION

For the foregoing reasons, the writ prayed should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

RICHFIELD OIL CORPORATION, A Corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the Petition of Richfield Oil Corporation for Writ of Certiorari.

INTRODUCTORY STATEMENT

The National Association of Manufacturers is a non-profit voluntary membership corporation composed of over 20,000 manufacturing concerns, including corporations, partnerships, sole proprietorships and other forms of business enterprises, located throughout the United States and its territories. Its members are employers of all sizes, having from one employee to many thousands. A large proportion of its members are employers subject to the Labor Management Relations Act, 1947,[1] and subject to the jurisdiction of the National Labor Relations Board.

Employee stock purchase plans have been established by a number of manufacturing corporations,[2] including members of this Association, as a means of stimulating employees' interest and encouraging their cooperation in the success of the enterprise. The possibility of adopting such plans, moreover, is a subject of consideration from time to time by other companies. In addition, the question of what matters are to be included in or excluded from the statutory duty to bargain is one of major importance to all employers.

ARGUMENT

This case, as presented and decided, may affect virtually all employers subject to the Labor Management Relations Act. The case does not turn on questions of fact since the facts are stipulated. Therefore the issue is purely one of law, whether the Act requires

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[1] 61 Stat. 136, 29 U.S.C. Sec. 141 et seq.

[2] For example, a list of 44 companies which have established such plans appears at page 21 of the Petition for Writ of Certiorari herein.

collective bargaining on stock purchase plans whereby employees may acquire capital stock in their employer's enterprise.

This question of law turns upon the interpretation of the Act. The Board decided it on the basis of three broad subsidiary interpretations of specific provisions of the statute. Its first two interpretations held that the statutory terms *wages* and *other conditions of employment* include everything, whether of value or not, which employees may receive from their employer or may ask to receive from him. Thus the Board ruled that *wages* "comprehends all emoluments of value which may accrue to employees because of their employment relationship" (Tr. 124). Likewise it ruled that *other conditions of employment* comprehends all of "the terms or conditions under which employment status is afforded" (Tr. 126).

Finally, in its third interpretation, the Board ruled that Section 8 (a) (5) of the Act, which declares it an unfair labor practice for an employer *to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)*, discloses an overriding "congressional intent to require collective bargaining as to all matters embraced by" the statutory terms *wages* and *other conditions of employment* as above construed by the Board (Tr. 128). This congressional intent, it said, "admits of no exceptions" and overrides all other policies of the Act so that arguments based thereon are "without substance" (Tr. 128).

Thus the Board's broad interpretation of *wages* and *other conditions of employment*, and its ruling that the statutory duty to bargain is as broad as that inter-

pretation, apparently would include all stock purchase plans or union demands therefor and would require all employers to bargain on such plans.

It is apparent that the majority opinion of the Court of Appeals treated the subject of interpretation of the statute as a matter solely within the discretion of the Board. Thus it stated:

> "To the Board has been left the determination as to what facts and circumstances spell out 'wages' or what situations involve other 'conditions of employment'. (Tr. 166). . . . The very fact that Congress has not defined 'wages' or 'terms' or 'other conditions of employment' makes it clear that the Board is to deal within its own competence and expertise with the multiple variance of differing aspects of the problems arising in these fields" (Tr. 169).

In line with these statements, the Court of Appeals adopted the Board's interpretations of the statute and accepted its conclusion that the statute requires bargaining with respect to stock purchase plans. Despite the requirement of the Administrative Procedure Act[3] that the reviewing court shall "decide all relevant questions of law" and "interpret constitutional and statutory provisions", a requirement which has been equated with the judicial review provisions of the Labor Management Relations Act by this Court in *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474 (1951), the Court of Appeals made no independent examination of the Board's interpretations "in the light and context of the purpose of the Act". *NLRB* v. *Electrical Workers,* 346 U.S. 464, 478 (1953). It is apparent, therefore, that the lower court engaged in

[3] 60 Stat. 243, 5 U.S.C. Sec. 1009 (e).

the very abdication of judicial function which Congress sought to prevent in adopting the Labor Management Relations Act. It did not perform the "conventional judicial function" nor did it assume its "responsibility for assuring that the Board keeps within reasonable grounds" in accordance with the mandate of this Court in the *Universal Camera* case, *supra,* at p. 490. The lower court has not discharged its primary responsibility for reviewing the conclusions of the Board, a responsibility which is even greater in cases involving questions of law relating to the interpretation of the Act than in those involving questions of fact. *NLRB* v. *American National Insurance Company,* 343 U.S. 395 (1952).

Many major policies of the Labor-Management Relations Act have not been weighed in reaching the present decision. The Act, for example, indicates a congressional intent that there shall be a clear line of demarcation, so far as collective bargaining is concerned, between ownership and management on the one side and employees and their unions on the other. Stock purchase plans, however, relate to the acquisition of shares of ownership by employees. Moreover, the shareholders select and direct the management, and compulsory bargaining over the acquisition of this power by employees undermines the very basis of management's position, tenure and authority.

The Act treats all employers alike, whether corporations, partnerships, or sole proprietorships. Moreover, it treats employers and unions alike so far as duty to bargain is concerned; it imposes on them a mutual and equal duty to bargain. Thus, if a stock purchase plan is a required subject of bargaining, it is immaterial whether the plan is proposed or estab-

lished by the employer or demands therefor are initiated by the union. If the Board's ruling would be applied alike to all in accordance with its sweeping terms, it would require partnerships and sole proprietorships to bargain with employees about acquisition of shares of ownership in the enterprise. Certainly an ownership interest, if acquired by employees through collective bargaining, would be within the Board's interpretation of wages as "all emoluments of value which may accrue to employees because of their employment relationship", and likewise within its interpretation of other conditions of employment as "the terms or conditions under which employment status is afforded".

Since the Board's interpretations include everything and exclude nothing, and since the Court of Appeals did not review them in light of other statutory policies and purposes in conflict therewith, as required by the Administrative Procedure Act and the *Universal Camera* decision, it is of utmost importance that the inclusions and exclusions of the statutory terms be determined by this Court and that a line be drawn accordingly.

CONCLUSION

For these reasons, therefore, that the Board's statutory interpretations and its ruling are all-inclusive and draw no line, that they have not been adequately reviewed in accordance with the conventional judicial process, and that they are of great importance in collective bargaining and in the administration of the

Labor Management Relations Act, it is submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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